No. 83-888

Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FELIX S. JACOB,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Daily Record Co., Baltimore, MD 21202

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals Was Wrong In Not Finding This To Be A General Warrant In Light Of *Andresen v. Maryland*, 427 U.S. 463 (1976), and *United States v. Burch*, 432 F. Supp. 961 (D. Del. 1977), *aff'd without opinion*, 577 F.2d 729 (3rd Cir. 1978).

2. Whether the United States Court of Appeals for the Fourth Circuit Erred In Adopting The Opinion Of The District Court, Which Held That The Seizure of Items Not Covered By The Warrant Was Justified By The Plain View Exception, In Light Of The Recent Decision *United States v. Apker*, 705 F.2d 293 (8th Cir. 1983), Which Holds That There Should Be No Plain View Exception In Severance Cases.

3. Whether The United States Court of Appeals For The Fourth Circuit Erred In Adopting The Opinion Of District Court in Allowing The Government To Amend The Information At The End Of its Case Without Allowing Jacob To Plead To The Amended Information Or Request A Jury Trial As Was His Right Under His Agreement With The Government.

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No.

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FELIX S. JACOB,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered August 10, 1982, and denial of a timely petition for rehearing entered in this proceeding on October 5, 1981, and the judgment of the United States Court of Appeals for the Fourth Circuit, entered on September 30, 1983.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fourth Circuit and the denial of petition for rehearing (No. 81-5049 and No. 82-5075) are appended hereto (Appendix B, C, and E).

JURISDICTION

The judgment of the Court below (App. B) was entered on August 10, 1981. A timely petition for rehearing was denied on October 5, 1981 (App. C). The second judgment of the Court below (App. E) was entered on September 30, 1983. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the Constitution of the United States provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizure, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution of the United States provides; "No person shall be deprived of life, liberty or property without due process of law."

STATUTES INVOLVED

26 U.S.C. § 7206(1) FRAUD AND FALSE STATEMENTS

Any person who—

(1) Declaration under penalties of perjury

"Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made

under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or"

18 U.S.C. § 1341 FRAUDS AND SWINDLES

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

STATEMENT OF FACTS

In April 26, 1979, Felix S. Jacob was a practicing attorney in Baltimore, Maryland, who had been a member of the Maryland Bar since his graduation from Harvard Law School in 1955, was licensed to practice before the Court of Appeals of Maryland and the Supreme Court of the United States, and had a good rating from Martindale-Hubbard and had never had any charge more serious than a speeding ticket. On that evening his office was subject to a raid by seven government agents, with a gun, for over seven hours, based on a warrant that mentioned dealings with Dr. Gluck and payoffs to three insurance adjusters

for mail fraud in violation of 18 U.S.C. § 1341. The facts were that Jacob had only had minimum contacts with Dr. Gluck and terminated the relationship in early 1973, there being a five year statute of limitation for mail fraud. In fact, Jacob had never even seen Dr. Gluck and had instructed everyone in his law offices to break off any contacts with Dr. Gluck in early 1973.

There was a complete misunderstanding regarding the three insurance adjusters, and not one penny was ever paid off to them. Not one of them testified before the Grand Jury involving Jacob, and one of them signed an Affidavit in the Federal file denying payoffs from Jacob.

Jacob subsequently signed an agreement with the government that he would be guilty of one count of making a false statement on a 1975 tax return, in violation of 26 U.S.C. § 7206(1), if the warrant and the search and seizure were deemed to be valid. Jacob gave up other defenses as regarding materiality and sanity. The amount of income tax involved is zero since the unclaimed alimony deductions of about $4,000.00 exceeded the unreported income of about $2,800.00. No other tax was found owing for any other year. On the other hand, the government has agreed that if the search and seizure of April 26, 1979, is not valid and that all evidence derived from the said search and seizure is not admissible, then Jacob should be acquitted on the charges before this Court.

Under the warrant, the executing officers were authorized to search for and seize:

> ledgers, etc., which show or tend to show evidence of violation of federal criminal law including, *but not limited to,* mail fraud in violation of 18 U.S.C. § 1341 (Emphasis added)

Acting upon the Defendant's motion, the District Court ordered the suppression of all evidence obtained during

the April 26, 1979, search. *United States v. Jacob*, 502 F. Supp. 1221 (D. Md. 1980). The basis of the suppression order was the Court's conclusion that the warrant was impermissibly general since, "on its fact, * * * (it) proposed to authorized the search for evidence of any federal crimes as long as the evidence 'relates' to the persons or transactions identified in the warrant," *Id.*, at 1220. Judge Miller noted, initially, that the underlying affidavit, while relevant to the issue of whether probable cause to search existed, cannot be used to cure the deficiencies, if any, in the instant warrant. It is undisputed here that the affidavit was not served with the warrant, and was not available for the use of the executing officer during the search. Therefore, the Court may not consider the information contained in the affidavit in determining whether the warrant was sufficiently specific. Judge Miller further notes that without a description of the crime or crimes alleged to be involved, there can be no meaningful review of the magistrate's probable cause determination, and the executing officers are left to decide for themselves what may be seized. The Court held on November 28, 1980, that the warrant authorizing the April 26, 1979, search of Defendant's law office was a general warrant, and thus violates the Fourth Amendment and, as such, all fruits of the search must be suppressed.

The United States Court of Appeals for the Fourth Circuit reversed and remanded the case in order that the District Court may consider and determine the issue of the scope of the search. Petitioner filed a Writ of Certiorari in the Supreme Court of the United States. Solicitor General Rex E. Lee in January of 1982 stated that whatever the merits of Petitioner's contentions, they were not presently ripe for review by this Court and that if Petitioner was convicted, he would then be able to present these claims to this Court, together with any other claims he may have, in

a Petition for a Writ of Certiorari seeking review of a final judgment against him.

On January 26, 1982, Jacob waived his right to trial by jury. The Government then presented Jacob's 1975 tax return and the stipulation and rested its case. Jacob moved for acquittal upon the basis that the stipulation failed to prove an underpayment of "taxable income". The Government then orally moved to amend the information by adding a charge that business income as well as taxable income was understated. Jacob made a timely objection. After a recess to the following morning, the Government offered a written Motion to Amend Information, clarifying its oral Motion of January 26, 1982. The motion was granted on January 26, 1982.

The Court then denied Jacob's proffer to show that Jacob's taxable income was *not* underreported by reason of his failure to claim certain itemized deductions. Jacob was not asked how he pleaded to the amended charges or whether he wished to have a jury trial on the amended charges as per his right under his executed agreement with the government. Petitioner was subsequently convicted by Judge Miller under the plain view doctrine justifying seizure of items turned up in the search though not covered by the warrant. The United States Court of Appeals for the Fourth Circuit affirmed this, becoming the only circuit in the country to allow the plain view exception in a severance case. It is Petitioner's contention the issues are ripe for review.

REASONS FOR GRANTING CERTIORARI

I.

THE *JACOB* DECISION IN THE FOURTH CIRCUIT IS IN CONFLICT WITH THE *BURCH* DECISION IN THE THIRD CIRCUIT REGARDING GENERAL SEARCH WARRANTS.

As Judge Miller points out on page 5, both the Defendant and the government rely on the Supreme

Court's opinion in *Andresen v. Maryland*, 427 U.S. 463 (1976). In that case the relevant warrant language was as follows:

> *"Together with other fruits, instrumentalities and evidence of crime at this (time) unknown."* 427 U.S. 480-81 n.10 (Emphasis supplied).

The Defendant in *Andresen* contended that the warrant was rendered "general" by the addition of the above highlighted language because it permitted the search for and seizure of evidence of any crime. In properly rejecting this argument, the Court states that such language had to be used in conjunction with what preceeded it, and that when so used "the term 'crime' in the warrant refer (ed) only to the crime of flase pretense with respect to the sale of Lot 13 T," 427 U.S. at 480-81 (Emphasis supplied).

In the Jacob warrant the executing officers were authorized to examine for evidence of "violation of federal criminal law including, *but not limited to*, mail fraud in violation of 18 U.S.C. § 3141." Paper No. 4, Ex. D. (Emphasis supplied). Thus, the element of specificity as to crimes that were deemed essential in *Andresen* is missing from the warrant at issue in Jacob.

In *United States v. Burch*, 432 F. Supp. 961 (D. Del. 1977), *aff'd without opinion*, 577 F.2d 729 (3rd Cir. 1978), the Court held that a warrant which authorized search of van and Defendant's garage for "automobile tires and a green 1975 Dodge van . . . and other *UNKNOWN ARTICLES* (Emphasis supplied) which are believed and reported to be stolen from Penn Central Railroad" was a general warrant repugnant to the Fourth Amendment, since the warrant was not limited to a search for evidences or fruits of any particular crimes but rather, on its face, permitted a search for anything that could have been stolen at any time from Penn Central.

On page 963, the Court stated:

> "Implicit in the Supreme Court's holding was the recognition that, by limiting the search to evidence of a single crime, the warrant gave executing officers a means to distinguish among Andresen's files and documents and to identify those they were authorized to seize. The warrant under consideration here differs in this critical respect: it was not limited to a search for evidence or fruits of any particular crime or crimes. On its face, this warrant permitted a search for anything which could have been stolen at any time from Penn Central in Wilmington. Because of the wide array of goods that are shipped by rail and which, thus, might fall into this category, the F.B.I. agents might reasonably have concluded that the warrant authorized them to seize virtually anything. The warrant imposed no effective limit on the scope of the search."

As of October, 1983, Jacob has found 148 circuit cases which have cited *Andresen*, thus necessitating a clarification. This huge volume of cases which have gone to the Circuit level since 1976 show a compelling reason for the Court to accept this writ in order to clarify its prior decision and give a clear mandate to all courts. *Andresen* refused to allow a bad fishtail to invalidate an otherwise good warrant. *Jacob* allows a good fishtail to validate an otherwise bad warrant.

II.

THE *JACOB* DECISION IN THE FOURTH CIRCUIT IS IN DIRECT CONFLICT WITH THE *APKER* DECISION IN THE EIGHTH CIRCUIT.

The Fourth Circuit in the *Jacob* case states on page 3:

> **"The District Court then had to consider the propriety of the Search and Seizure under the warrant inasmuch as they extended beyond the matters specified in the warrant. In a clear,**

> comprehensive, concise opinion, the District Court determined that the Plain View Doctrine justified seizure of the items turned up in the search though not covered by the warrant, and we adopt that opinion."

The Eighth Circuit in *United States v. Apker*, 705 F.2d 293 (8th Cir. 1983) stated on page 307:

> The approach of severing the general parts of a warrant, rather than considering the entire warrant invalid, has been embraced by four circuits, although in a more narrow version than that suggested by the dissent. *United States v. Riggs*, 690 F.2d 298 (1st Cir. 1982); *United States v. Christine*, 687 F.2d 749 (3d Cir. 1982); *United States v. Cardwell*, 680 F.2d 75 (9th Cir. 1982); *United States v. Cook*, 657 F.2d 730 (5th Cir. 1981). Although these courts accepted the severance approach in principle, no court has permitted the admission of items found in plain view while executing the specific parts of the warrant. We would have to adopt an expansive, plain view severance approach to allow the guns to be admitted in this case. In *Riggs* and *Cook*, the courts were addressing the admissibility of items which were specifically described in the warrant. In *Christine*, a concurring judge would have adopted the plain view severance approach, but the majority did not adopt that rule. In *Cardwell*, the severance approach was embraced only in dicta; the court did not discuss a plain view extension.
>
> The version of the plain view extension suggested by the dissent is particularly expansive. There is nothing in the record to show whether the police found the guns at defendants' residences when they were looking for the specific items or the general items. Nevertheless, the dissent would exclude evidence only if it "could not have been seized" pursuant to the specific parts of the warrant. This is an unnecessary expansion of the severance rule adopted by several circuits, and could lead to what in effect would be a general warrant.

> A plain view-severance approach is particularly inappropriate with indicia warrants. Indicia warrants by their nature are potentially subject to abuse. *See* p. 302, *supra*. Pretext can at times go undetected by a magistrate, and the possibility of an almost unlimited search may be too tempting for law enforcement officials. The effect of adopting a plain view-severance approach could be to uphold seizures pursuant to all but the most general indicia warrants. Therefore, we reject that approach in this case.

Therefore, it appears that the recent decision of the Fourth Circuit in the *Jacob* case is in direct contrast to the Eighth Circuit decision in the *Apker* case, as well as the position taken by the 1st, 3d, 5th and 9th Circuits, as cited in the *Apker* case.

III.

Jacob was denied fundamental due process under the Fifth Amendment to the Constitution of the United States by not being asked whether he wanted a jury trial to the amended charges.

CONCLUSION

Petitioner asks this Court to accept this Writ to further clarify *Andresen* and *Apker* and avoid any appearance of not being a Democratic Society, but being a police state as predicted in the novel "1984". When Jacob was in his second year at Harvard Law School in 1953-1954, he took a course in comparison of Soviet and American Law and received a B. Never did he dream that his law office would be subject to a Kremlin type raid by seven agents armed with a gun, looking for any "evidence of violation of Federal Criminal Law."

The government does not contend that Jacob owed one penny of tax for 1975 or any other year but has gone to the incredible expenditure of time and money to put Jacob through the ordeal of four Federal Trials. Jacob is innocent.

Respectfully submitted,

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APPENDIX A

In The United States District Court
for the District of Maryland

Criminal No. M-80-0237

United States of America

v.

Felix S. Jacob

MEMORANDUM AND ORDER

Defendant was charged by information with subscribing to a false income tax return for the tax year ending 1975. 26 U.S.C. § 7206(1). The government's evidence to support the charge was seized during a search of defendant's law office on April 26, 1979. This case is now before the court on defendant's motion to suppress the evidence seized during that search.

I. Factual Overview

On April 26, 1979, United States Postal Inspector James Mock swore out an affidavit in support of warrants to search defendant's law office for evidence of a scheme involving insurance fraud (Paper No. 4, Ex. A). The affidavit discusses transactions between defendant and Dr. Julius Gluck, and beween defendant and certain insurance adjusters.[1] The affidavit alleges that defendant was involved in a scheme whereby Dr. Gluck would prepare

[1] Upon the joint motion of the government and defendant, the names of the insurance adjusters have been excised from the public record and placed under seal. See Order dated Novenber , 1980 (Paper No.). This was done to protect the secrecy of grand jury proceedings and the privacy interests of these persons and to avoid any possible unfairness should the grand jury not ultimately return indictments against them.

false medical bills and defendant would use these bills to obtain inflated personal injury insurance settlements. It is also alleged that defendant made cash payoffs to the insurance adjusters. In reliance upon this affidavit, a United States Magistrate issued the warrant that is the subject of this motion (Paper No. 4, Ex. B.).[2]

The warrant was executed by seven government agents, one of whom was a special agent with the Internal Revenue Service. The search extended over a period in excess of seven hours, and defendant and his attorney were present during the search. The inventories (Paper No. 4, Exs. B-1, B-2, and C-1) reveal that in addition to documents relating to defendant's transactions with the persons identified in the warrant, the agent seized *all* of the law office's cancelled checks for the years 1972 through 1977, entire journals and ledgers containing entries not relating to the persons named in the warrant, and a 1975 income tax worksheet. Inspector Mock's affidavit was not served with the warrant but was obtained by defendant several days after the search.

II. The Parties' Contentions

In support of his suppression motion, defendant first contends that the warrant was "impermissibly general" in that it authorized the search for, and seizure of, evidence of "any federal crime" involving defendant and the persons named in the warrant. Defendant bases this contention on the language in the warrant authorizing the seizure of documents relating to transactions among defendant, Dr. Gluck, and the insurance adjusters which:

> ". . . show or tend to show evidence of violations of federal criminal law including but not limited to mail fraud in violation of 18 U.S.C. § 1341."

Paper No. 4, Ex. B.

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[2] Two warrants were issued, see Paper No. 4, Ex. C, but the evidence sought to be suppressed was seized only pursuant to the warrant attached to Paper No. 4 as Exhibit B.

Defendant's second contention is that because the warrant was not specific as to the crimes for which evidence could be sought, except possibly as to mail fraud, the description of documents subject to seizure was necessarily overbroad. In other words, says the defendant, absent a direct connection with specific, enumerated crimes the document description could not have operated to circumscribe the discretion of the officers executing the warrant.

Finally, defendant asserts that there were insufficient facts set forth in Inspector Mock's affidavit to support the Magistrate's finding of probable cause to issue the warrant. While conceding that the affidavit may have supported a probable cause finding with respect to some crimes, defendant contends that the affidavit did not set forth facts sufficient to establish probable cause to search for evidence of all the crimes authorized by the warrant.

In response, the goverment first asserts that the warrant is not impermissibly general because it limited the officers' discretion to search for documents only connected with the transactions among defendant and the persons identified in the warrant. According to the government, therefore, as long as the officers are directed to search for categories of documents relating to specific persons and transactions, a warrant need not be specific as to the crimes for which evidence is sought.

The government's second contention is that although certain language in the warrant may appear to have authorized a search for evidence of a broad range of crimes, when that language is read in conjunction with the warrant's description of persons, transactions, and categories of documents, it actually authorizes only the search for evidence of a certain type of crime: fraud in connection with personal injury insurance claims arising out of automobile accidents. The government asserts, therefore, that when the warrant is so read a crime is specified, and whether such fraud would be ultimately

mail fraud, wire fraud, or some other federal fraud crime is immaterial to the facial validity of the warrant.

The government's third contention is that since Inspector Mock's affidavit sets forth facts sufficient to establish probable cause to search for evidence of automobile insurance fraud, and the Magistrate issued the warrant based on this affidavit, the warrant was supported by probable cause.

Thus, the primary issues for decision are whether the warrant violated the Fourth Amendment's particularity requirement as to (1) the crimes for which evidence was sought, and (2) the items subject to seizure for those crimes. Also of significance is whether the warrant as ultimately construed was supported by probable cause.[3]

III. Was the Warrant A General Warrant?

The primary purpose underlying the Fourth Amendment's particularity requirement is to avoid the evil associated with the general warrant; that is, "a general, exploratory rummaging in a person's belongings." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). *See Weeks v. United States*, 232 U.S. 383, 389-91 (1914); *Wallace v. King*, 626 F.2d 1157, 1160 (4th Cir. 1980). This goal is to be achieved by substituting the judgment of a neutral magistrate for that of the seizing officer as to what may be taken, and "nothing is left to the discretion of the officer executing the warrant." *Marron v. United States*, 275 U.S. 192, 196 (1927). *See Andresen v. Maryland*, 472 U.S. 463, 480 (1976); *Stanford v. Texas*, 379 U.S. 476, 485 (1965). *See generally United States v. United States District Court*, 407 U.S. 297, 316-18 (1972). The gist of defendant's contentions is that this warrant vested too much discretion in the executing officers because it was not specific as to the crime.

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[3] Defendant also challenges the time frame set forth in the warrant and the excution of the search. In light of the court's decision on the issue of generality, these other contentions need not be addressed.

It should be noted initially that the underlying affidavit, while relevant to the issue of whether probable cause to search existed, cannot be used to cure the deficiencies, if any, in the instant warrant. The rule that the generality of the warrant may be cured by the specificity of the supporting affidavit hinges on two findings: (1) that the affidavit accompanied the warrant; and (2), that the affidavit was incorporated into the warrant by suitable words of reference. *See, e.g., United States v. Gill,* 623 F.2d 540, 543 (8th Cir. 1980); *United States v. Klein,* 565 F.2d 183, 186 n.3 (1st Cir. 1977); *Moore v. United States,* 461 F.2d 1236, 1238 (D.C. Cir. 1972). It is undisputed here that Inspector Mock's affidavit was not served with the warrant, and was not available for the use of the executing officers during the search.[4] Therefore, the court may not consider the information contained in the affidavit in determining whether the warrant was sufficiently specific.

In support of their respective positions, both the defendant and the government rely on the Supreme Court's opinion in *Andresen v. Maryland,* 427 U.S. 463 (1976). In that case the relevant warrant language was as follows:

> "[T]he following items pertaining to sale, purchase, settlement and conveyance of lot 13, block T, Potomac Woods subdivision, Montgomery County, Maryland: [various categories of documents] showing or tending to show a fraudulent intent, and/or knowledge of the crime of false pretenses, in violation of Article 27, Section 104, of the Annotated Code of Maryland, 1957 Edition, as amended and revised, *together with other fruits, instrumentalities and evidence of crime at this [time] unknown.*"

427 U.S. at 480-81 n.10 (emphasis supplied).

[4] In any event, the warrant's only language of reference is as follows: "affidavit(s) having been made for me . . . I am satisfied . . . that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s)." Paper No. 4, Ex. B.

The defendant in *Andresen* contended that the warrant was rendered "general" by the addition of the above-highlighted language because it permitted the search for and seizure of evidence of any crime. In rejecting this argument, the Court stated that such language had to be read in conjunction with what preceeded it, and that when so read "the term 'crime' in the warrants *referr[ed] only to the crime of false pretenses with respect to the sale of Lot 13T.*" 427 U.S. at 480-81 (emphasis supplied). Consequently, the Court concluded that the warrant authorized the search for and seizure of evidence relevant only to a specific crime involving a particular piece of property, and was thus not a general warrant. 427 U.S. at 482.[5]

If the warrant at issue here authorized a search for, and seizure of, evidence relating only to specific crimes, then the court's inquiry would likely be at an end. This and other circuits have approved search warrants employing similar generic descriptions when the items subject to seizure were books and records not involving First Amendment considerations. *See, e.g., United States v. Dennis,* 625 F.2d 782, 792 (8th Cir. 1980); *United States v. Federbush,* 625 F.2d 246, 251-52 (9th Cir. 1980); *United States v. Torch,* 609 F.2d 1088, 1090 (4th Cir. 1979), *cert. denied,* ___ U.S. ___, 100 S. Ct. 2928 (1980); *United States v. Cortellesso,* 601 F.2d 28, 30-32 (1st Cir. 1979). In all these cases, however, the warrant specified the crime or crimes for which the evidence was sought. Here, even assuming that the warrant described the categories of items to be seized with sufficient particularity the executing officers were authorized to examine them for evidence of "*violations of federal criminal* law including *but not limited to* mail fraud in violation of 18 U.S.C. § 3141." Paper No. 4, Ex. B (emphasis supplied). Thus, the element of specificity as to crime that was deemed essential in *Andresen* is missing from the warrant at issue

[5] Dissenting, Mr. Justice Brennan questioned how the Court's subsequent construction of the warrant's language could have operated to restrain the discretion of the executing officers. 427 U.S. at 484, 493 (Brennan, J., dissenting).

in this case. *See, e.g., United States v. Giresi,* 488 F. Supp. 445, 457-58 (D. N.J. 1980); *United States v. Burch,* 432 F. Supp. 961, 963 (D. Del. 1977), *aff'd without opinion,* 577 F.2d 729 (3d Cir. 1978).

During oral argument the government asserted that this court's reading of *Andresen* was too narrow, and, as an example of a broader interpretation, cited *In Re Search Warrant Dated July 4, 1977, Etc.,* 572 F.2d 321 (D.C. Cir. 1977), *cert. denied,* 435 U.S. 925 (1978). In that case, however, the court of appeals reversed the district court's suppression order and held that the warrant was not overbroad as to the description of the items of property subject to seizure or the crimes as to which the evidence was sought. 572 F.2d at 323-324. Additionally, the court noted that the warrant incorporated by reference, and was accompanied by, a lengthy affidavit particularizing the nature of the offenses enumerated in the warrant, and the relationship of the items subject to seizure to those offenses. 572 F.2d at 326. Thus, contrary to the government's contention, *In Re Search Warrant Dated July 4, 1977, Etc.,* does not stand for the proposition that it is unnecessary to specify in the warrant the crimes for which evidence is sought. *See, e.g., Application of Lafayette Academy,* 610 F.2d 1, 4 (1st Cir. 1979); *Blackie's House of Beef, Inc. v. Castillo,* 480 F. Supp. 1078, 1088 n.16 (D. D.C. 1979).

The Fourth Amendment's requirements of probable cause and particularity are inextricably intertwined. Legitimate expectations of privacy, *see Katz v. United States,* 389 U.S. 347 (1967), are protected by (1) reserving the probable cause determination to a neutral magistrate rather than one "engaged in the often competitive enterprise of ferreting out crime," *Johnson v. United States,* 333 U.S. 10, 14 (1948), and (2), by particularizing the probable cause determination in the warrant. Such particularization limits the intrusiveness of the search by circumscribing the discretion of the executing officers. *Coolidge v. New Hampshire,* 403 U.S. at 467.

For a probable cause determination to be meaningful there must be a nexus among (1) criminal activity, (2) the things to be seized, and (3) the place to be searched. 1 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 3.7(d) at 704 (1978). *See* Amsterdam, *Perspectives on the Fourth Amendment,* 58 Minn. L. Rev. 349, 358 (1974).

To uphold the validity of this warrant would negate the purposes underlying a neutral probable cause determination. While the supporting affidavit appears sufficient to permit a finding of probable cause as to the categories of items described in the warrant, and the place where they may be found, it does not establish probable cause to search for evidence of an infinite variety of federal crimes. Yet, on its face, the warrant purports to authorize the search for evidence of any federal crime as long as the evidence "relates" to the persons or transactions identified in the warrant. The failure to match probable cause as to a specific crime with the warrant's authorization to search is a sufficient reason to invalidate a warrant. *See Application of Lafayette Academy,* 610 F.2d at 3.

The government maintains, however, that a close reading of the instant warrant discloses that it authorizes a search for, and seizure of, evidence only as to federal fraud crimes involving personal injury insurance claims arising from automobile accidents. This argument is troubling for several reasons. First, the court would have to speculate that the Magistrate found probable cause to exist for "certain" fraud crimes even though these crimes are not identified in the warrant. Second, it requires the court to assume that the executing officers interpreted the warrant as does the government's attorney who is trained in the law and has had several months to prepare his narrowing interpretation. Yet, even if the officers had seized fortuitously only those records for which probable cause as to a specific crime existed, this would not validate a facially overbroad warrant. *See United States v. Abrams,* 615 F.2d 541, 544 (1st Cir. 1980).

This court recognizes that when it comes to "particularly describing" those items thought to be evidence of a crime, especially in fraud and conspiracy cases, the government is often faced with an almost impossible burden. *See United States v. Abrams,* 615 F.2d at 547, 548 (Campbell, J., concurring). For this reason the Fourth Circuit has adopted the rule that "there is a practical margin of flexibility permitted by the constitutional requirement for particularity in the *description of items* to be seized." *United States v. Torch,* 609 F.2d at 1090, *quoting United States v. Dennis,* 542 F.2d 743, 745 (8th Cir. 1976) (emphasis supplied). The constitutionality of this standard with respect to *items* to be seized was recognized, at least implicitly, in *Andresen.* 427 U.S. at 482-84.

When it comes, however, to the specificity required for the description of the crimes for which evidence is sought, particularly after a lengthy investigation, the government need not be afforded such latitude. If the government cannot state with some measure of particularity, and the warrant cannot reflect, what crimes there is probable cause to believe the evidence sought is associated with, then a warrant may not constitutionally issue. Without a description of the crime or crimes alleged to be involved there can be no meaningful review of the magistrate's probable cause determination, and the executing officers are left to decide for themselves what may be seized. For the reasons set forth above, the court holds that the warrant authorizing the April 26, 1979, search of defendant's law office was a general warrant, and thus violative of the Fourth Amendment. As such, all fruits of the search must be suppressed.[6]

Accordingly, it is this 28th day of *November,* 1980, by the United States District Court for the District of Maryland, *ORDERED:*

1. Defendant's motion to suppress is GRANTED.

[6] Since the Court holds that the warrant is a general warrant, the severance doctrine is inapplicable.

2. The Clerk is instructed to forward a copy of this Memorandum and Order to counsel for the parties.

JAMES R. MILLER, JR.,
United States District Judge.

APPENDIX B

United States Court of Appeals
For The Fourth Circuit

No. 81-5049

United States of America,

Appellant,

versus

Felix S. Jacob,

Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
James R. Miller, Jr., District Judge.

Argued: May 4, 1981 *Decided: August 10, 1981*

Before FIELD, Senior Circuit Judge; MURNAGHAN, Circuit Judge; and ERWIN, District Judge.*

Stephen J. Immelt, Assistant United States Attorney (Russell T. Baker, Jr., United States Attorney on brief) for Appellant; Marvin J. Garbis (Stephen C. Struntz, Garbis & Schwait, P.A. on brief) for Appellee.

FIELD, Senior Circuit Judge:

Pursuant to 18 U.S.C. § 3731, the Government has appealed an order of the district court suppressing evidence obtained under a search warrant.

---

* Honorable Richard C. Erwin
Middle District of North Carolina
Sitting by designation

During an investigation of insurance fraud in personal injury claims arising from automobile accidents, the United States Attorney's Office received information which implicated Felix S. Jacob, an attorney at law, in a scheme to submit fraudulent claims to certain insurance companies for the purpose of inflating out of court settlements. The defendant allegedly acted in concert with Dr. Julius Gluck and certain insurance adjusters to submit false medical bills to insurers, settle the claims for substantially higher amounts than otherwise could have been obtained, and retain that portion of the proceeds from the settlements which exceeded actual medical expenses.

On the basis of this information the Government submitted a proposed search warrant and supporting affidavit to the United States Magistrate who issued a warrant authorizing a search of the defendant's law offices. The warrant was executed on April 26, 1979, and evidence obtained during the search led to a one count information charging the defendant with making a false individual federal income tax return in violation of 26 U.S.C. § 7206(1).

Acting upon the defendant's motion, the district court ordered the suppression of all evidence obtained during the April 26, 1979 search. *United States v. Jacob,* 502 F. Supp. 1221 (D. Md. 1980). The basis of the suppression was the court's conclusion that the warrant was impermissibly general since, "on its face, * * * [it] purports to authorize the search for evidence of any federal crime as long as the evidence 'relates' to the persons or transactions identified in the warrant." *Id.,* at 1226.

The warrant authorized the seizure of financial records for the period January 1, 1972 through December 31, 1977, which related to claims for bodily injuries arising out of automobile accidents involving clients represented by the defendant and treated by Dr. Gluck, and clients represented by the defendant with claims against persons insured by three insurance companies and in which

certain named adjusters represented the companies.[1] Under the warrant the executing officers were authorized to search for and seize:

> ledgers, journals, bank statements, checks, cancelled or otherwise, check vouchers, check stubs, checkbooks, deposit tickets, savings account books, for escrow account, regular account and any and all other checking and savings bank accounts, settlement sheets and other records of settlement for the time period January 1, 1972 through December 31, 1977, which relate to:
>
> 1. Clients who were represented by Felix S. Jacob and treated by Dr. Julius C. Gluck, in connection with claims for bodily injuries arising out of automobile accidents.
>
> 2. Clients who were represented by Felix S. Jacob in connection with claims for bodily injuries arising out of automobile accidents and which claims were made against persons insured by:
>
>   a. The Nationwide Mutual Insurance Company in which [X] acted as the adjuster for that company;
>
>   b. The Maryland Automobile Insurance Fund in which [Y] acted as the adjuster for that company; and
>
>   c. The Maryland Casualty Company in which [Z] acted as the adjuster for that company.
>
> which ledgers, journals, bank statements, checks, cancelled or otherwise, check vouchers, check stubs, checkbooks, deposit tickets, savings account books, for escrow account, regular account and any and all other checking and savings bank accounts, settlement sheets and other records of settlement with respect to clients represented in connection with claims for bodily injury arising out of automobile accidents for the time period of January 1, 1972 through December 31, 1977, show or tend

[1] The names of the adjusters were ordered excised from the public record by the district court.

> to show evidence of violations of federal criminal law including *but not limited to* mail fraud in violation of 18 U.S.C. § 1341.
>
> [Emphasis added].

It was the presence of the phrase "but not limited to" which troubled the district court. The court concluded that these four words destroyed the warrant's requisite specificity with respect to the crime or crimes for which it was issued. The court was of the opinion that in the light of this phraseology, the warrant failed to circumscribe the discretion of the executing officers with respect to the nature of their search, and also precluded meaningful review of the Magistrate's probable cause determination. Accordingly, the narrow issue before us is whether the phrase "but not limited to" in that part of the warrant which links the Magistrate's determination of probable cause with items to be seized destroyed the particularity of the warrant.

The Fourth Amendment's guarantee against unreasonable searches and seizures is, of course, in part implemented by the constitutional requirement that "no Warrants shall issue, but upon probable cause, * * * and particularly describing the * * * things to be seized." This standard seeks to prevent a "general, exploratory rummaging in a person's belongings," *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971), by substituting the neutral discretion of the magistrate for that of the officer executing the warrant with respect to those items to be seized. *Marron v. United States*, 275 U.S. 192, 195-96 (1927).

In *Andresen v. Maryland*, 427 U.S. 463 (1976), the Supreme Court had occasion to consider whether warrants similar to the one here under consideration failed to comply with the Fourth Amendment. The defendant in that case, an attorney under investigation for fraudulent real estate settlements, contended that language included in the warrants destroyed their otherwise specific nature by permitting the search and seizure of evidence of *any*

crime. The warrants, issued for defendant's law offices, called for the seizure of:

> '[T]he following items pertaining to sale, purchase, settlement and conveyance of lot 13, block T, Potomac Woods subdivision, Montgomery County, Maryland:
>
> [various categories of documents]
>
> showing or tending to show a fraudulent intent, and/or knowledge as elements of the crime of false pretenses, in violation of Article 27, Section 140, of the Annotated Code of Maryland, 1957 Edition, as amended and revised, *together with other fruits, instrumentalities and evidence of crime at this [time] unknown.*'

Id., at 480 n.10.

The defendant contended that the high-lighted language rendered the warrant "general." The Court rejected this argument, holding that the phrase should be read as authorizing only the search for and seizure of evidence relating to the crime of false pretenses:

> The challenged phrase is not a separate sentence. Instead, it appears in each warrant at the end of a sentence containing a lengthy list of specified and particular items to be seized, all pertaining to Lot 13T. We think it clear from the context that the term 'crime' in the warrants refers only to the crime of false pretenses with respect to the sale of Lot 13T. The 'other fruits' clause is one of a series that follows the colon after the word 'Maryland.' All clauses in the series are limited by what precedes that colon, namely, 'items pertaining to * * * lot 13, block T.' The warrants, accordingly, did not authorize the executing officers to conduct a search for evidence of other crimes but only to search for and seize evidence relevant to the crime of false pretenses and Lot 13T. (footnotes omitted)

Id., at 481-82.

The district couirt viewed *Andresen* as inapposite since it perceived that the language in the present warrant precluded a similar finding of specificity. We cannot agree with this restrictive reading of *Andresen*. The First Circuit has recently interpreted that case to mean that "the 'general' tail of the search warrant will be construed so as to not defeat the 'particularity' of the warrant." *United States v. Abrams*, 615 F.2d 541 (1980). In *Abrams* the Court stressed that "[b]usiness records, although they may contain evidence of fraud, do not fall into the category of stolen or contraband goods" and therefore a warrant authorizing their seizure must contain more than a description of categories in generic terms. The Court distinguished the "general" warrant before it from those approved in *Andresen* on the ground that there was a complete absence of particularity with respect to the items to be seized under the warrant. In our opinion it is this particularity which, if present, will not be defeated by ambiguous conclusionary language. While a sufficiently particular qualifying phrase may have the effect of bringing an otherwise "general" warrant within the constitutional standard, a defective qualifying phrase will not defeat a warrant which is otherwise sufficiently specific. *See Application of Lafayette Academy, Inc.*, 610 F.2d 1, 5 (1 Cir. 1979). We think this interpretation of *Andresen* is consistent with the standard of our circuit which seeks to avoid the suppression of evidence seized pursuant to a warrant because of "hypertechnical" errors.

> In contexts that do not involve First Amendment considerations, the test for the necessary particularity is a pragmatic one: 'The degree of specificity required when describing the goods to be seized may necessarily vary according to the circumstances and type of items involved * * *. [T]here is a practical margin of flexibility permitted by the constitutional requirement for particularity in the description of items to be seized.' *United States v. Davis*, 542 F.2d 743. 745 (8 Cir. 1976).

United States v. Torch, 609 F.2d 1088, 1090 (1979); *United States v. Espinoza*, 641 F.2d 153, 165 (4 Cir. 1981).

Under the present warrant, the executing officers were authorized to seize a wide variety of financial records, but by its terms the warrant limited the scope of seizable documents to those involving defendant's clients who had been treated by Dr. Gluck and/or who made claims against certain insurance companies represented by named adjusters, and involving personal injury claims during a specified period of time. Taking into consideration the complexity of the alleged fraud and the fact that the warrant circumscribed the ambit of seizable documents by category and time, we think it was sufficiently particularized with respect to the items to be seized. We are further of the opinion that the challenged phrase should properly be treated as merely superfluous and falls within the "practical margin of flexibility" afforded warrrants in cases of this type.[2] Accordingly, we hold that it was error for the district court to suppress all of the evidence obtained under the warrant.

The conclusion of the district judge that the warrant was "general" made it unnecessary for him to reach the issue of whether the search by the agents exceeded the

[2] The Court in *Andresen* appears to have recognized this "margin of flexibility":

> Petitioner also suggests that the specific list of the documents to be seized constitutes a "general" warrant. We disagree. Under investigation was a complex real estate scheme whose existence could be proved only by piecing together many bits of evidence. Like a jigsaw puzzle, the whole "picture" of petitioner's false-pretense scheme with respect to Lot 13T could be shown only by placing in the proper place the many pieces of evidence that, taken singly, would show comparatively little. The complexity of an illegal scheme may not be used as a shield to avoid detection when the State has demonstrated probable cause to believe that a crime has been committed and probable cause to believe that evidence of this crime is in the suspect's possession.

427 U.S. at 480, footnote 10.

scope of the warrant. While the parties have treated this issue somewhat tangentially in their briefs, upon the record before us it would be impossible to make a determination on this issue. Accordingly, the case will be remanded in order that the district court may consider and determine the issue of the scope of the search. The suppression order is reversed and the case is remanded for further proceedings.

REVERSED AND REMANDED

APPENDIX C

United States Court of Appeals
for the Fourth Circuit

No. 81-5049

United States of America,

Appellant,

versus

Felix S. Jacob,

Appellee,

ORDER

(Filed October 5, 1981)

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Field for a panel consisting of Judge Winter, Judge Field, and Judge Erwin (U.S.D.J.).

FOR THE COURT,

/s/ WILLIAM K. SLATE, II,
Clerk.

APPENDIX D

In The United States District Court
for the District of Maryland

Criminal No. M-80-0237

United States of America

v.

Felix S. Jacob

MEMORANDUM AND ORDER

This case is before the court on remand from the Fourth Circuit's decision in *United States v. Jacob*, 657 F.2d 49 (4th Cir. 1981), *rev'ing*, 502 F. Supp. 1221 (D. Md. 1980). On appeal, the Fourth Circuit reversed this court's order suppressing the fruits of the April 26, 1979, search of the defendant's law office, holding that the warrant authorizing the search was not a general warrant. 657 F.2d at 51-52. In accordance with the mandate of the Court of Appeals, this court must now determine whether in executing the warrant government agents exceeded its scope in seizing certain cancelled checks unrelated to the specific crimes under investigation.

A hearing was held on December 11, 1981, at which time the court heard testimony and argument from counsel. Because of their critical importance to the issues to be decided, the facts giving rise to the search, and those connected with the warrant's execution, will be set out in some detail.

I. *Overview*

In 1974, the United States Attorney for this District began investigating insurance fraud in connection with personal injury claims for automobile accidents. The

Government's investigation revealed that certain doctors and lawyers falsely inflated medical expense reports, which in turn lead to inflated settlement awards. In some instances it was believed that lawyers had bribed insurance adjusters to settle cases for inflated amounts.

The insurance fraud schemes uncovered by the investigation had certain common features. The doctor would submit to the attorney a medical report exaggerating the client's injuries. The medical bills submitted by the doctor would reflect those exaggerations. The lawyer would then present the inflated medical reports and bills to the insurance company. This would result in inflated settlement awards. Upon settlement of a case, the proceeds of the settlement were divided in such a way that the amount actually received by the doctor was less than the inflated amount reflected in the medical report and bills. The practice was known as "bill cutting." In this manner the lawyer was often able to share in the proceeds of the fraud.

The fraud was concealed through a practice known as "double checking." Typically, four checks would be drawn after the settlement of a case. One check would go to the doctor for an amount less than that reflected by the inflated medical bills. One check would go to the attorney in an amount representing his purported fee. Two checks for the balance of the proceeds would be drawn to the order of the client. The client, however, would actually receive the proceeds of only one of the checks. The attorney would negotiate the other check, representing the difference between the doctor's bill and the amount actually paid to the doctor, and retain its proceeds in cash. The attorney's settlement sheets and related financial records constituted important evidence in the criminal prosecutions growing out of the investigation because the pattern that emerged from the "double checking" revealed not only the actual amount received by the doctor but also the method of generating excess cash for the lawyer. In some cases this excess cash was used as payoff money for insurance adjusters.

By the spring of 1979, the Government's investigation uncovered evidence that Jacob had used the above-described scheme, apparently to defraud insurance companies. Julius C. Gluck, a doctor convicted of such fraud, revealed that he had provided Jacob's law firm with inflated medical bills and that these bills were "cut" routinely. Dr. Gluck's own records indicated that Jacob's law firm referred clients to him through 1975. Rona Goldstein, Dr. Gluck's secretary through 1976, corroborated such a relationship between Jacob and Dr. Gluck. Goldstein admitted to the Government that she had prepared false medical bills and reports for various attorneys and that Jacob's law firm was among those to which such documents were sent. In addition, Goldstein recalled having specific conversations with Jacob regarding the preparation of false medical bills.

The Government also learned that Jacob may have made cash payoffs to insurance adjusters in order to obtain inflated settlements from the companies for whom the adjusters worked. Leonard J. Sperling, an attorney employed by Jacob's law firm from 1966 to 1975, told federal investigators that Jacob had admitted to him making cash payoffs to adjusters associated with three insurance companies. Eugene A. Shapiro, another associate with Jacob's law firm, confirmed that Jacob had a close relationship with one of the insurance adjusters identified by Sperling. Shapiro also stated that Jacob's law firm generated cash, partly by negotiating clients' personal injury checks.

Based on the above information, on April 26, 1979, the Government applied to a United States Magistrate for a warrant authorizing the search of Jacob's law office.[1] A second warrant was sought for a room rented by Jacob in another office suite.[2] Accompanying the warrant appli-

[1] The geographic scope of the warrant included Jacob's personal office and all file and reception areas. The warrant excluded the offices of two attorneys who practiced with Jacob. Paper No. 4, Ex. B.

[2] Paper No. 4, Ex. C.

cation was a detailed affidavit from United States Postal Inspector James Mock, one of the investigators who had participated in the continuing fraud investigation.[3]

As construed by the Fourth Circuit, the warrant at issue here[4] authorized the executing officers to search for and

> "to seize a wide variety of financial records, but by its terms the warrant limited the scope of seizable documents to those involving defendant's clients who had been treated by Dr. Gluck and/or who made claims against certain insurance companies represented by named adjusters, and involving personal injury claims during a specified period of time."

657 F.2d at 52.[5]

In other words, the scope of the warrant was bounded by three types of limitations. First, the warrant was restricted to specific categories of financial records.[6] Second, the financial records covered by the warrant were limited to those from the period January 1, 1972 through December 31, 1977. Finally, the warrant authorized the seizure of such records only in connection with two classes of clients. The first class consisted of those clients who had been treated by Dr. Gluck. The second class included those clients whose claims arose out of an automobile accident against a person who was insured by one of three insurance companies, and where the company was represented in the case by a certain adjuster.

The warrant under consideration was signed by United States Magistrate Clarence E. Goetz on April 26, 1971, at

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[3] Paper No. 4, Ex. A.

[4] Paper No. 4, Ex. B.

[5] Upon the joint motion of the Government and the defendant, the names of the insurance adjusters were excised from the public record. 502 F. Supp. at 1223 n.1.

[6] The types of documents seizable under the warrant included ledgers, journals, checks, cancelled or otherwise, check vouchers and stubs, checkbooks and deposit tickets, settlement sheets and savings account books. Paper No. 4, Ex. B.

approximately 5:00 P.M. Immediately thereafter, six federal agents, one of whom was a Special Agent with the Internal Revenue Service, went to Jacob's law office to execute the warrant. Upon their arrival the agents identified themselves and were informed that Jacob was in his personal office. The agents waited for over fifteen minutes without any response from Jacob. Concerned about the possible destruction of documents, Inspector Mock knocked on the door to Jacob's office and informed him that the search would begin. Jacob then requested that the agents delay the search until the arrival of Peter Parker, Jacob's attorney. Inspector Mock agreed to that request. Shortly after Parker's arrival several of the agents began to review Jacob's client files to determine which files concerned clients falling within the classes specified in the warrant. These files were arranged alphabetically, not chronologically, and some dated back to 1958.

Inspector Mock and Special Agent Amato focused their attention initially on Jacob's personal office. A journal was discovered that purported to report the breakdown of payments to clients, medical expenses, and attorney's fees for various settlements handled by Jacob and his firm, including settlements consummated during the period covered by the warrant. In addition, Special Agent Amato discovered a large quantity of cash, consisting of $100 and $20 bills, in Jacob's desk drawer.

As the agents sorted through the files certain ones that appeared to fall within the warrant were set aside for later review. Jacob, however, picked up some files that had been segregated and moved them to areas of the office which were beyond the agents' view. At one point, the agents were informed by Jacob's law partner that certain areas of the office did not contain any of Jacob's records. An inspection of those areas, however, revealed that they did contain files relating to cases handled by Jacob. In addition, Jacob insisted on debating the agents as to the legality of the warrant. There were also discussions about

whether particular files should be reviewed. Jacob's conduct was such that Inspector Mock telephoned Assistant United States Attorney Richard D. Bennett, at approximately 11:00 P.M., for advice regarding how to proceed. Bennett spoke to Parker and informed him that Jacob was not to interfere with the search.

At an early stage of the search, Parker inquired of Inspector Mock as to the estimated length of the search. Mock replied that the agents would leave at 9:00 P.M. and return the next day if Parker would vouch for the security of the records. Parker refused to make such a commitment, and subsequently informed Inspector Mock that the agents could not stay past 10:00 P.M. When Inspector Mock disagreed, Parker telephoned Magistrate Goetz. After his conversation with Magistrate Goetz, at approximately 9:30 P.M., Parker advised Inspector Mock that the agents could remain on the premises past 10:00 P.M.

Following Parker's telephone call to Magistrate Goetz, there was some discussion as to how detailed the inventory was to be. Parker stated that Magistrate Goetz had advised him that an inventory listing each of the thousands of cancelled checks could be required. Parker indicated, however, that he did not wish to remain until the completion of such an inventory. After conferring with Jacob, Parker informed Inspector Mock that they would not require the agents to list each check on the inventory. The search was completed sometime prior to 12:00 A.M. on April 26, 1979, and the agents left Jacob's law office at approximately 1:00 A.M.

The only documents seized from Jacob's client files were eighty-eight adding machine tapes.[7] Each tape reflected the amounts disbursed in the settlement of a case coming within the limitations of the warrant. Handwritten notations on the tapes indicated the party to whom money had been paid, and the month and year of the settlement.[8]

[7] The inventories for the search are docketed as Paper No. 4, Exs. B-1, B-2 and C-1.

[8] *See, e.g.*, Defendant's Exs. H-1 through H-5.

Also seized was a journal maintained by Jacob containing information regarding the disbursement of funds at settlements.[9] At Jacob's request, the agents removed only those portions of the journal that covered settlements reached during the years 1972 through 1977.

In addition, the agents seized all cancelled checks for the law firm's escrow and expense checking accounts for the period 1972 through 1979.[10] The cancelled checks were stored in cardboard bankers' boxes. Notations on the outside of the bankers' boxes indicated the dates and numbers of the checks stored in each box.

There was conflicting testimony at the hearing as to whether the checks were organized in the bankers' boxes by date or check number.

The court has resolved the conflicting evidence by concluding as a fact that the boxes containing the office and escrow accounts checks were not completely organized by check number or date, although they were generally so organized. Some of the cancelled checks, however, were wrapped in bank statements and others were not. The bank statements relating to the accounts were randomly interspersed through the boxes of cancelled checks and were not all in the same order. The check stubs were also contained in certain of the boxes.

The agents cursorily examined the bankers' boxes of cancelled checks, GXs 4 thru 7, to see if the contents of the boxes generally contained cancelled checks for the periods referred to on the legends affixed to the exterior of the boxes. They attempted to remove cancelled checks and other materials relating to periods outside the limits of the

[9] *See, e.g.*, Paper No. 29, Ex. 2.

[10] The agents also seized a 1975 income tax worksheet. Since the Government will not attempt to introduce that document as evidence in this case, the court need not consider the legality of its seizure. *See Andresen v. Maryland*, 427 U.S. 463, 467-68, 482 n.11 (1976). There is no indication that the evidence sought to be introduced was a product of or derived from information contained in or on the tax worksheet.

warrant. The agents intended to examine the office account checks to see, among other things, if any checks were paid to Dr. Gluck during the relevant period from that account. They had found a check stub from 1974 to Dr. Gluck, purportedly in connection with the settlement of a case involving a client of Jacob's named Geraldine Powell, dated February 5, 1974 in the amount of $200.00, for which they could find no cancelled check.

Because the cancelled checks within the bankers' boxes were not susceptible to a ready identification of their method of organization or to a ready determination of whether, in fact, they were all organized similarly, the agents decided that they would remove the boxes of cancelled checks from the premises in order to facilitate their search for the authorized materials. Other factors influencing their decision were the lateness of the hour, the generally confused atmosphere at that time in Jacob's office, their perception that Jacob was interfering in the search, the desire of Jacob's attorney to leave, and the consent of Jacob and his attorney that the boxes of checks could be itemized as units on the inventory rather than the individual contents of each box.

The next morning at their office the agents began to review the cancelled checks in an effort to match them to the eighty-eight cases that had been identified from the search of Jacob's client files. According to the Government, the agents could not review the checks effectively until they were placed in numerical order within each box.[11] This was because while the adding machine tapes and the ledger entries for a particular settlement indicated the amounts disbursed, the party to whom funds had been disbursed, and the month and the year of the settlement, these documents did not indicate how many checks had been drawn, the date the check was written, or the number of the checks corresponding to a particular settlement. In reviewing the checks, the agents discovered that the number of checks issued at settlement varied

[11] Placing the cancelled checks in sequence required 16 man-hours.

from case to case. In addition, Jacob occasionally represented more than one client in a single accident case. In those instances, separate checks would be issued to the different clients, although that fact was not reflected on the adding machine tape or in the ledger. Further, Jacob often wrote a single check to a doctor in payment for treatment provided to clients in different cases. An additional factor was that Jacob did not always issue a separate attorney's fees check in each case. Instead, periodic withdrawals were made from the escrow account without attribution to a particular settlement.

Once the cancelled checks were arranged by check number, the agents began their review. As they sorted through the checks a pattern of "double checking" emerged. Although this pattern of "double checking" did not involve any of the eighty-eight cases identified from Jacob's client files, the agents knew from their experience with the investigation that "double checking" was used to conceal incidents of insurance fraud. In short, although the checks involved in this "double checking" pattern did not relate to the two classes of clients set out in the warrant, the agents removed them from the bankers' boxes because they believed them to be evidence of other crimes committed by Jacob.

After reviewing the cancelled checks and the other settlement records seized from Jacob's office, the agents ultimately located the checks relating to the eighty-eight cases for which they had adding machine tapes. The entire review of the cancelled checks and the settlement records required in excess of fifty man-hours.

A criminal information was filed against Jacob on June 11, 1980, charging him with filing a false individual federal tax return for the tax year 1975. I.R.C. § 7206(1). The principal evidence supporting the charge consists of the "double checks" seized from the bankers' boxes that did not relate to the eighty-eight cases for which adding machine tapes were seized during the search of April 26, 1979.

Before filing the information, however, the Government found it necessary to examine the endorsements on the back of the checks and then interview the endorsing client to determine whether the proceeds of a particular check had actually been retained by Jacob. The investigation concerning these checks revealed that not all of the funds from the "double checks" were retained by Jacob, and that some of the checks were drawn for legitimate purposes. Jacob admits, however, that at least one half of the total amount represented by these checks was retained by him and not paid to the client to whose order the check was drawn.[12]

II. *Discussion*

Two principal remaining issues are raised by Jacob's suppression motion.[13] One is whether the agents violated the Fourth Amendment in removing from Jacob's office the bankers' boxes containing all of the law firm's cancelled checks for the period 1972 through 1977. The other issue is whether the agents violated the Fourth Amendment in removing from the bankers' boxes cancelled checks unrelated to the classes of clients identified in the warrant. Since a negative answer to the second question would make it unnecessary to address the first issue, that question will be considered initially.

A. *The Plain View Doctrine*

Assuming for the moment that it was constitutionally permissible for the agents to remove all of the cancelled

[12] Government's Exhibit No. 2.

[13] Jacob also contends that at the hearing of November 21, 1980, the Government waived its right to present evidence relating to the actual search and has conceded that the cancelled checks at issue here were not in plain view. Having reviewed the transcript of the hearing, Paper No. 23 at 17-20, the court finds these arguments to be without merit. The sole issue at that hearing that counsel were prepared to argue, and the court was prepared to hear, was whether the warrant was a general warrant. As noted by the Fourth Circuit, this court did not reach the question of whether the search exceeded the scope of the warrant. *United States v. Jacob*, 657 F.2d at 52-53.

checks from Jacob's office, and examine them the next day at their own office, it must be decided whether their seizure from the bankers' boxes without a warrant violated the Fourth Amendment.[14]

As construed by the Fourth Circuit, the warrant authorizing the search of Jacob's law office did not include within its express terms the checks underlying the instant tax prosecution. *United States v. Jacob*, 657 F.2d at 52. The Government contends, however, that these checks were subject to [illegible] under the plain view doctrine. Jacob [illegible] agents necessary to invoke the plain [illegible] present in this case.

The plain view doctrine [illegible] formulated by Justice Stewart for the plurality in *Coolidge v. New Hampshire*, 403 U.S. 443, 464-71 (1971), has three aspects: (1) the officer must have been legitimately in a position to view the evidence; (2) the discovery of the evidence must have been inadvertent; and (3) the incriminating nature of the evidence must have been immediately apparent.

The first aspect of [illegible] doctrine is easily satisfied in this case. [illegible] the agents legitimately on the premises [illegible] the warrant, but they were authorized by the terms of the warrant to search Jacob's cancelled [illegible] Jacob's reliance, therefore, on cases such as *[illegible] v. Jackson*, 576 F.2d 749, 752-53 (8th Cir. 1978), is misplaced.[16]

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[14] The Government has not argued and, therefore, the court will not consider whether the checks at issue here were seizable under the warrant as evidence of Jacob's intent to engage in a fraudulent scheme with Dr. Gluck. *See Andresen v. Maryland*, 427 U.S. at 482-84. Accordingly, to sustain the seizure the court must find that it falls within one of the recognized exceptions to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 357 (1967).

[15] Jacob has conceded this point in his reply memorandum. Paper No. *30*, at 2 & 7.

[16] In *Jackson*, an FBI agent went to the defendant's office for the purpose of effecting an arrest. While on the premises, the

It is not altogether clear whether the Fourth Circuit considers "inadvertence" to be an essential element of the plain view doctrine. *Compare United States v. Hawkins*, 687 F.2d 227, 234 (4th Cir. 1982) *and United States v. Sifuentes*, 504 F.2d 845, 848 (4th Cir. 1974) *with Weaver v. Williams*, 509 F.2d 884, 886 (4th Cir. 1975) *and United States v. Bradshaw*, 490 F.2d 1097, 1101 n.3 (4th Cir. 1974). *See generally United States v. Liberti*, 616 F.2d 34, 38 (2d Cir. 1980) (Newman, J., concurring); *United States v. Pine*, 473 F. Supp. 349, 357-58 (D. Md. 1978); 2 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 4.11 (d) (1978).

Assuming, however, that inadvertence is a necessary element, its application in the instant case would not invalidate the seizure from the bankers' boxes of the cancelled checks underlying the instant prosecution. "What *Coolidge* proscribes is an anticipated discovery, where the police know in advance the location of the evidence and intend to seize it." *United States v. Liberti*, 616 F.2d 34, 37 (2d Cir. 1980), *quoting United States v. Bolts*, 558 F.2d 316, 320 (5th Cir. 1977), *cert. denied*, 434 U.S. 930 (1977). For Government agents to be charged with such advance knowledge, it must be shown that they had probable cause to believe that the evidence would be found in a certain place before they searched. *United States v. Hare*, 589 F.2d 1291, 1295-96 (6th Cir. 1979); *United States v. Welsch*, 440 F.2d 220, 223 (10th Cir. 1971). *See* C. Whitebread, *Criminal Procedure* § 11.03 (1980).

A mere suspicion or expectation that the evidence would be found does not preclude the application of the plain view doctrine. *See, e.g., United States v. Liberti*, 616 F.2d at 37; *United States v. Hare*, 589 F.2d at 1294; *United*

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agent searched without a warrant the defendant's closed attache case and file cabinet and seized certain documents therefrom. The Eighth Circuit held the plain view doctrine inapplicable, because only the items, and not their contents, were in plain view. The reasoning of *Jackson* is inapposite here because the agents were lawfully in a position to view the cancelled checks.

States v. Worthington, 544 F.2d 1275, 1280 n.4 (5th Cir.), *cert. denied*, 434 U.S. 817 (1977); *Petition of Becker*, 515 F. Supp. 1193, 1197 (D. Kan. 1981).

It is plain that the agents' discovery of the cancelled checks underlying the instant prosecution was inadvertent within the meaning of *Coolidge*. These checks were found during the course of organizing all of the checks so that the agents could review them in connection with the eighty-eight cases identified from Jacob's client files. While the agents may have had a suspicion that Jacob was involved in fraud schemes with person other than Dr. Gluck or the insurance adjusters, or had even violated the federal income tax laws, there has been no showing that the agents had probable cause to believe that evidence of such other crimes would be found during a search of either the law office or the bankers' boxes. Contrary to Jacob's assertion, the fact that an Internal Revenue agent assisted in executing the warrant and reviewing the checks does not mean that the Government had probable cause to believe that specific evidence of tax violations would be found during, or as a product of, the search.

Jacob next contends that even if the Government can satisfy the first two prongs of the plain view exception the cancelled checks must be suppressed because their incriminating nature was not immediately apparent. In support of this assertion, Jacob advances three arguments. First, the cancelled checks were not incriminating within the meaning of *Coolidge* because "double checks" have legitimate purposes, and before proceeding against him the Government had to trace the proceeds of the checks to Jacob through the endorser. Second, Jacob argues that the checks could not have been incriminating as to mail fraud, the crime specified in the warrant, because no mail fraud prosecution has been brought against him based on the checks. Finally, Jacob contends that even if the checks are incriminating, this did not become apparent until the checks had been subjected to "excessive scrutiny."

Jacob's first two arguments merit little discussion. For the cancelled checks "to be 'incriminating' for constitutional purposes, the seizing authority need only have reasonable or probable cause to believe that [they were] evidence of a crime." *United States v. Ross*, 527 F.2d 984, 985 (4th Cir. 1975), *cert. denied*, 424 U.S. 945 (1976). *Accord, United States v. Chesher*, 654 F.2d 1285, 1293 (9th Cir. 1981); *United States v. Ochs*, 595 F.2d 1247, 1258 (2d Cir.), *cert. denied*, 444 U.S. 955 (1979).

Given the agents' experience with the continuing investigations, and their knowledge of the role played by "double checks" in the various schemes, the court finds that they had probable cause to believe that the cancelled checks at issue were evidence of crime. *See Andresen v. Maryland*, 427 U.S. at 482-84; *Warden v. Hayden*, 387 U.S. 297, 307 (1967). That these checks ultimately proved to be evidence of a different crime does not negate the reasonableness of their belief at the time of the checks' seizure. *See* 2 W. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 4.11(b) at 167-68 (1978).

At first blush, Jacob's argument regarding excessive scrutiny appears persuasive. In contrast with the usual sort of document seizure upheld under the plain view doctrine, *see, e.g., United States v. Diecidue*, 603 F.2d 535, 559 (5th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); *United States v. Phillips*, 593 F.2d 553, 556-58 (4th Cir. 1978); *Mapp v. Warden*, 531 F.2d 1167, 1172 (2d Cir. 1976); *United States v. Damitz*, 495 F.2d 50, 56 (9th Cir. 1974), the agents' handling of the checks was fairly protracted and extensive. Nevertheless, under the circumstances of this case, such handling of the checks does not amount to "excessive scrutiny."

Unlike the agents' conduct in cases such as *United States v. Scios*, 590 F.2d 956, 963-64 n.15 (D.C. Cir. 1978) (en banc) and *United States v. Robinson*, 535 F.2d 881, 885-86 (5th Cir. 1976), the agents in this case, in reviewing all of the cancelled checks from 1972 through 1977, were acting within the scope of the search author-

ized by the warrant. *United States v. Crouch*, 648 F.2d 932, 933 (4th Cir. 1981). *See United States v. Pincus*, 450 F. Supp. 66, 68-70 (W.D. Pa. 1978). Thus, it cannot be said that when viewing the checks the agents were engaged in "a general exploratory search from one object to another until something incriminating at last emerge[d]." *Coolidge v. New Hampshire*, 403 U.S. at 466. *See Stanley v. Georgia*, 394 U.S. 557, 569-72 (1969) (Stewart, J., concurring in the result).

In addition, that the agents perused each check is, under the present circumstances, without constitutional significance. When the checks underlying the instant prosecution were viewed, the agents were reviewing all of the checks to determine whether any of them related to the eighty-eight cases identified from Jacob's client files. The "double checking" pattern revealed itself when the agents were organizing the checks in numerical order in preparation for that review. That the agents arguably could have discovered the checks relating to the eighty-eight cases by another method of analysis does not detract from the reasonableness of their conduct. The warrant authorized an invasion of Jacob's privacy as to all of the checks, and he cannot complain that in performing their duties under the warrant, and in a reasonable manner, the agents discovered evidence of his criminal conduct. Under the circumstances, the agents' examination of the checks, for an expressly authorized purpose, does not constitute scrutiny that is excessive within the meaning of the plain view doctrine. *See United States v. Crouch*, 648 F.2d at 933-34; *United States v. Ochs*, 595 F.2d 1257-58 & n.8.

Accordingly, the court concludes that the seizure from the bankers' boxes of the cancelled checks underlying this tax fraud prosecution falls within the reach of the plain view exception to the warrant requirement.

Next to be determined is whether removing the bankers' boxes containing all of the law firm's cancelled checks for the years 1972 through 1977 violated the Fourth Amendment. In other words, did the agents' removal of the

cancelled checks prior to their being searched require the express authorization of a warrant to be reasonable under the Fourth Amendment?

The Government relies on *United States v. Beusch,* 596 F.2d 871 (9th Cir. 1979), as providing at least analogous authority for the legality of removing the bankers' boxes from Jacob's office. In *Beusch,* a warrant was issued to Government agents authorizing them to search the San Francisco office of Deak & Company (Deak) for documentary evidence relating to transactions between Deak and Arthur Gimenez. During the course of the search, the agents seized items that included evidence of similar but unrelated transactions between Deak and another individual. These items were as follows: (1) a ledger containing a record of all of Deak's sales and purchases for a twelve month period; (2) a file containing all "1973 incoming cables"; and (3) a ledger containing records on foreign customers. The first two items were organized chronologically, and the third was organized alphabetically. All three items contained evidence seizable under the terms of the warrant. Approximately ninety percent of the indictment, however, was based on evidence derived from the three items relating to Deak's transactions with the other individual. 596 F.2d at 876.

The defendants contended on appeal that the three items should have been suppressed on the ground that their seizure exceeded the scope of the warrant. The defendants reasoned that the information contained in the items relating to the Gimenez transactions was easily identifiable and could have been removed from the items at the scene of the search. In rejecting the defendants' arguments, Judge Carter stated as follows:

> "The two appellants cite no authority for the proposition that pages in a single volume of written material must be separated by searchers so that only those pages which actually contain the evidence sought may be seized. Such a rule would substantially increase the amount of time required

> to conduct a search, thereby aggravating the intrusiveness of the search. It would conceivably require the use of auditors, bookkeepers and accountants in a documents search such as the one in this case in order to protect against inadvertent seizure of materials outside the scope of the warrant.
>
> * * *
>
> "All three items admittedly contained information seizable under the terms of the warrant and they therefore met the particularity requirement of the Fourth Amendment. As long as an item appears, at the time of the search, to contain evidence reasonably related to the purposes of the search, there is no reason — absent some other Fourth Amendment violation — to suppress it. *Warden v. Hayden*, 387 U.S. 294, 307, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967). The fact that an item seized happens to contain other incriminating information not covered by the terms of the warrant does not compel its suppression, either in whole or in part. In so holding, we are careful to point out that we are discussing single files and single ledgers, *i.e.*, single items which, though theoretically separable, in fact constitute one volume or file folder. The reasons we have given for allowing their seizure may not apply to sets of ledgers or files, but because that is not the case here, we find it unnecessary to discuss it further."

596 F.2d at 876-77.

The court finds Judge Carter's reasoning in *Beusch* to be persuasive as to the legality of the agents' removal of the bankers' boxes from Jacob's office. Here, as in *Beusch*, the document containers removed from the place of the search had within them documents subject to seizure under the warrant. Contrary to Jacob's assertion; the bankers' boxes of cancelled checks are analogous to the items removed from the premises in *Beusch*, particularly the file containing all "1973 incoming cables." Moreover, the checks

in the bankers' boxes were not as organized as the information in the items seized in *Beusch*.

Although each cancelled check could, theoretically, be considered a single item separate from the remainder of the checks, the difficulties in determining those that related to the eighty-eight cases identified from Jacob's client files are as apparent here as they were in *Beusch*. Thus, while such a removal as occurred here might not be constitutionally permissible in all cases, the court holds, under the reasoning of *Beusch*, that the instant removal did not violate the Fourth Amendment.[17]

The Government also asserts that the reasoning of Judge Conner's opinion in *United States v. Abrahams*, 493 F. Supp. 310 (S.D.N.Y. 1980), is relevant to the legality of the agents' removal of the bankers' boxes from Jacob's office. In that case Government agents, pursuant to a warrant, searched the office of Lloyd, Carr & Company for documents evidencing fraud in connection with the sale of commodities futures. During the course of the search the agents removed from the defendant's office a locked safe and a locked file cabinet. These items were removed unopened because the agents could not gain entry to them at the defendant's office but believed them to contain documents similar to those found in an adjacent, unlocked filing cabinet.

The court in *Abrahams* analyzed the agents' opening of the containers under *United States v. Chadwick*, 433 U.S. 1 (1977). Their removal from the office, however, was held to be reasonable without a warrant specifically so authorizing because of the obstructive conduct of the defendant's employees during the search. 493 F. Supp. at 313 & n.3.

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[17] In the case of cancelled checks, as distinguished from other types of documents, it appears that a person may not have a legitimate expectation of privacy sufficient to implicate the warrant clause of the Fourth Amendment. *See United States v. Miller*, 425 U.S. 435, 442 (1976).

In the instant case, the agents offered to leave Jacob's office by 9:00 P.M. if Parker, Jacob's attorney who was present during the search, would vouch for the security of the records. When Parker declined to make that commitment the agents had no choice but to attempt to review all of the records possibly falling within the warrant that same night. This was not practicable, however, given the volume of material to be reviewed. In addition, the agents in good faith believed that their search was being hampered to some degree by Jacob's own conduct in moving files designated by the agents for further review. Under these circumstances, the agents' legitimate and articulable concerns regarding the security of the records, if left over night, provide an additional reason justifying the agents' decision to remove the bankers' boxes of cancelled checks. *See United States v. Abrahams*, 493 F. Supp. at 313 at n.3. *Cf. United States v. Turner*, 650 F.2d 526, 528 (4th Cir. 1981) (exigent circumstances for warrantless search and seizure).

For the reasons set out above, it is this 23rd day of December, 1981, by the United States District Court for the District of Maryland, ORDERED:

1. The defendant's motion to suppress evidence is DENIED.

2. The Clerk is instructed to forward a copy of this Memorandum and Order to counsel for the parties.

JAMES R. MILLER, JR.,
United States District Judge.

APPENDIX E

United States Court of Appeals
for the Fourth Circuit

No. 82-5075

United States of America,

Appellee,

v.

Felix S. Jacob,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
James R. Miller, Jr., District Judge.

Argued August 31, 1983 *Decided September 30, 1983*

Before WINTER, Chief Judge, MURNAGHAN, Circuit Judge, and BUTZNER, Senior Circuit Judge

---

James D. Johnson, Shelson H. Braiterman (Robert Rowe Jenkins, Mary Morton Kramer on brief) for Appellant; Stephen J. Immelt, Assistant U. S. Attorney (J. Frederick Motz, U. S. Attorney on brief) for Appellee.

PER CURIAM:

Felix S. Jacob, a lawyer, entered a stipulation under which he acknowledged that he had willfully subscribed to and filed a false 1975 individual federal tax return in violation of 26 U.S.C. § 7206(1). It was further stipulated between Jacobs and the United States that no other

charges were to be brought relating to the subject of a particular grand jury's investigation. Furthermore, the stipulation referred to a search and seizure pursuant to a warrant, the validity of which was in the course of being questioned in court. In substance, the stipulation acknowledged that, if the items seized pursuant to the warrant were not to be suppressed, Mr. Jacob was guilty, and there would be sufficient evidence to support a finding of guilt.[1] On the other hand, if suppression wee to take place with respect to the items seized in the course of execution of the warrant, the Government acknowledged that it would be unable to produce evidence sufficient to allow a finding of guilt.

The district court in an initial consideration determined that the warrant was, indeed, a general warrant and hence bad. *United States v. Jacob*, 502 F. Supp. 1221 (D. Md. 1980). However, a panel of this Court reversed in *United States v. Jacob*, 657 F.2d 49 (4th Cir. 1981), *cert. denied*, 455 U.S. 942 (1982), holding that the warrant was not a general warrant.

The district court then had to consider the propriety of the search and seizure under the warrant inasmuch as they extended beyond the matters specified in the warrant. In a clear, comprehensive, concise opinion, the district court determined that the plain view doctrine justified seizure of the items turned up in the search though not covered by the warrant, and we adopt that opinion. *See United States v. Jacob*, United States District

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[1] The stipulation, in pertinent part, read:

> Accordingly, should the Government prevail in its contention that the search and seizure of April 26, 1979 was (sic) valid and that all evidence derived from the said search and seizure (including the admissions contained in this Stipulation) is admissible then there should be a conviction of Mr. Jacob on the charge before this Court.

A connected letter agreement provided: "On the other hand, if the Court upholds the validity of the search and seizure, Mr. Jacob wishes to acknowledge his guilt of the charge and forego any other defenses he may have."

Court for the District of Maryland, No. M-80-0237, December 23, 1981.

Having lost on the only grounds which seemed to remain open to him under the stipulation with the Government, Jacob, nevertheless, raised a contention that the information charging violation of 26 U.S.C. § 7206(1) in effect asserted a different crime in contravention of the contrary provision in the stipulation.[2] The district court convincingly demonstrated that the amendment did not introduce a different charge but merely made more specific the information under which the Government was proceeding, concerning a crime of which Jacob had stipulated he should stand convicted if the argument for suppression of the products of the search should fail. Again we adopt the opinion of the district court. *United States v. Jacob,* United States District Court for the District of Maryland, No. M-80-0237, proceedings of January 27, 1982.

AFFIRMED.

[2] Jacob's counsel sought to make bricks without straw by contending that the stipulation did not establish the crime charged in the information as amended because it referred to a misstatement of gross income while the information charged a misstatement of taxable income.

Office - Supreme Court, U.S.
FILED
MAR 2 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-888

In the Supreme Court of the United States

OCTOBER TERM, 1983

FELIX S. JACOB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the description of items to be seized in the search warrant involved here satisfied the particularity requirement of the Fourth Amendment.

2. Whether the seizure of items not described in the warrant, but found in plain view, violated the Fourth Amendment.

3. Whether the courts below correctly concluded that permitting the government to amend the information did not prejudice petitioner in any way.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-888

FELIX S. JACOB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 39a-41a) is reported at 718 F.2d 1093. An earlier opinion of the court of appeals (Pet. App. 11a-18a) is reported at 657 F.2d 49. The first opinion of the district court (Pet. App. 1a-10a) is reported at 502 F. Supp. 1221. The opinion of the district court on remand (Pet. App. 20a-38a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1983. The petition for a writ of certiorari was filed on November 29, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial on stipulated facts in the United States District Court for the District of Maryland, petitioner was convicted of filing a false tax return, in violation of 26 U.S.C. 7206(1). He was sentenced to 60 days' imprisonment. The court of appeals affirmed (Pet. App. 39a-41a).

1. In 1974, the United States Attorney for the District of Maryland began an investigation of insurance fraud in connection with personal injury claims arising from automobile accidents. The investigation revealed that certain doctors and lawyers, including petitioner and Dr. Julius Gluck, conspired to submit false medical expense reports to certain insurance companies for the purpose of inflating out-of-court settlements and retaining that portion of the settlement proceeds that exceeded actual medical expenses (Pet. App. 12a, 20a-22a). Based upon the affidavit of an investigator working on the case, United States Postal Inspector Mock, a warrant was issued on April 26, 1979, authorizing the search of petitioner's law office for the following (Pet. App. 13a-14a):

> [L]edgers, journals, bank statements, checks, cancelled or otherwise, check vouchers, check stubs, checkbooks, deposit tickets, savings account books, for escrow account, regular account and any and all other checking and savings bank accounts, settlement sheets and other records of settlement for the time period January 1, 1972 through December 31, 1977, which relate to:
>
> 1. Clients who were represented by Felix S. Jacob and treated by Dr. Julius C. Gluck, in connection with claims for bodily injuries arising out of automobile accidents.

2. Clients who were represented by Felix S. Jacob in connection with claims for bodily injuries arising out of automobile accidents and which claims were made against persons insured by:

a. The Nationwide Mutual Insurance Company in which [* * *] acted as the adjuster for that company;

b. The Maryland Automobile Insurance Fund in which [* * *] acted as the adjuster for that company; and

c. The Maryland Casualty Company in which [* * *] acted as the adjuster for that company. [1]

which ledgers, journals, bank statements, checks, cancelled or otherwise, check vouchers, check stubs, checkbooks, deposit tickets, savings account books, for escrow account, regular account and any and all other checking and savings bank accounts, settlement sheets and other records of settlement with respect to clients represented in connection with claims for bodily injury arising out of automobile accidents for the time period of January 1, 1972 through December 31, 1977, show or tend to show evidence of violations of federal criminal law including but not limited to mail fraud in violation of 18 U.S.C. § 1341.

The warrant was issued at approximately 5:00 p.m. (Pet. App. 23a-24a). Six federal agents immediately went to petitioner's law office to execute the warrant. After awaiting the arrival of petitioner's attorney, the search began (*id.* at 24a). The agents seized 88 adding machine tapes, each of which reflected amounts disbursed in the settlement of a case in the category described in the warrant and contained

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[1]The names of the adjusters were ordered excised from the public record by the district court (Pet. App. 13a n.1).

handwritten notations indicating the party paid and the date of the settlement. They also seized petitioner's journal containing information respecting the disbursement of settlement funds and all cancelled checks for the law firm's escrow and checking accounts for the period 1972-1979. *Id.* at 25a-26a.[2] The cancelled checks were stored in boxes, but the district court found that they were not completely organized (*id.* at 26a). As a result, the agents decided to remove the boxes from petitioner's law office for examination in the morning (Pet. App. 27a).[3]

The following morning the agents began to sort and organize the checks in an effort to match them to the 88 cases identified from the search of petitioner's client files. Once the checks were arranged by check number, the agents began to review them and discovered a pattern of "double checking."[4] The investigation preceding issuance of the warrant had revealed that "double checking" was a practice commonly used to conceal the fraud. The pattern initially uncovered by the agents in sorting the checks did not relate to the clients specifically described in the warrant, but the agents nevertheless held the checks aside because they

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[2]The agents also seized petitioner's 1975 tax worksheet, but that was not introduced into evidence (Pet. App. 26a n.10).

[3]Additional factors influencing the agents' decision to remove the boxes were the lateness of the hour (after midnight), the generally confused atmosphere in petitioner's office, the agents' perception that petitioner was interfering with the search, the desire of petitioner's attorney to leave, and petitioner's consent that each box of checks would be itemized as a unit on the inventory (Pet. App. 27a).

[4]"Double checking" refers to the practice of issuing two checks payable to the client, while in fact only one check is actually received by the client. The other check, representing the difference between the doctor's inflated bill and the amount actually paid to him, would be negotiated by the attorney who would retain its proceeds in cash. See Pet. App. 21a.

believed the checks were evidence of other crimes committed by petitioner. The continued review of the checks ultimately located the checks relating to the 88 cases for which the agents had adding machine tapes and that related to the categories described in the warrant. Pet. App. 27a-28a.

2. A criminal information was filed against petitioner on June 11, 1980, charging him with filing an individual federal tax return for the tax year 1975 that was false in that it understated taxable income, in violation of Section 7206(1) of the Internal Revenue Code of 1954 (26 U.S.C.). The principal evidence supporting the charge consisted of the "double checks" seized from the check boxes, which did not relate to the clients described in the warrant (Pet. App. 28a). Prior to trial, petitioner entered into a stipulation providing that petitioner would stand guilty of the charge of filing a false tax return if his suppression motion were denied (*id.* at 39a-40a).

3. The district court granted petitioner's motion to suppress the evidence seized during the search (Pet. App. 1a-10a). The court held that the language of the warrant describing the records to be seized as showing evidence of violations of federal criminal law including "but not limited to" mail fraud was too general with regard to the description of the crimes involved and did not limit the discretion of the searching officers as to the records to be seized. The court of appeals reversed that holding but it remanded the case for findings as to the scope of the search (*id.* at 11a-18a). The court held that, taking the warrant as a whole, the items to be seized were described with sufficient particularity and that the phrase in question was properly treated as "superfluous" (*id.* at 17a).

On remand, the district court found that the scope of the search did not violate the Fourth Amendment (Pet. App. 20a-38a). Specifically, the court held that the removal of the

boxes from petitioner's law office was lawful because the boxes constituted single items containing documents subject to seizure under the warrant. The court noted that the agents' action was further justified by the refusal of petitioner's attorney to vouch for the security of the records if the agents left the boxes in petitioner's office overnight and by the agents' good faith belief that the search was being hampered by petitioner's conduct in moving files designated by the agents for further review. *Id.* at 34a-38a. In addition, the court upheld, under the plain view doctrine, the seizure of the "double checks" that were not related to the clients described in the warrant (*id.* at 29a-34a). The court of appeals affirmed on the basis of the district court's opinion (*id.* at 39a-41a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Accordingly, review by this Court is unwarranted.

1. Relying upon *Andresen* v. *Maryland*, 427 U.S. 463 (1976), and *United States* v. *Burch*, 432 F. Supp. 961 (D. Del. 1977), aff'd, 577 F.2d 729 (3d Cir. 1978), petitioner contends (Pet. 6-8) that the warrant authorizing the search of his law office was a general warrant and therefore repugnant to the Fourth Amendment. Specifically, petitioner argues that the phrase "but not limited to mail fraud" in the warrant's description of the crimes evidenced by the records to be seized is an overbroad description of the crimes involved and destroys the specificity of the warrant. This contention was correctly rejected by the court of appeals on petitioner's first appeal.

The search warrant in this case was quite detailed and set forth the items to be searched for and seized with particularity. See Pet. App. 13a-14a; pages 2-3, *supra*. It clearly limited the search to specific categories of financial records for the

period between January 1, 1972, and December 31, 1977, that related to personal injury claims arising from automobile accidents in which petitioner's client was treated by a particular doctor or was insured by one of three insurance companies, where the company was represented by a certain named adjuster. The documents to be seized thus were restricted by category, time, and the involvement of particular individuals in the claims. Consequently, the items to be seized were described with particularity and necessarily were related to the specific crime of mail fraud, for which probable cause had been shown. The search warrant clearly did not authorize a general search. Thus, the court of appeals correctly held that the specificity of the warrant was not destroyed by the phrase "but not limited to" in the tail of the warrant.

The court's decision in *Andresen* plainly supports this result. The crux of the Court's decision there was that a general description in the "tail" of a warrant would not render invalid an otherwise particular and carefully circumscribed description of the items to be seized, where the context makes clear that no general search is intended. 427 U.S. at 481-482. As long as the warrant considered as a whole meets the particularity requirement, a superfluous general phrase will not convert it into an impermissible general warrant.[5]

2. Petitioner further contends (Pet. 8-10) that the court of appeals' decision upholding the seizure of items not described in the warrant but discovered in plain view during the course of the execution of the warrant conflicts with *United States* v. *Apker*, 705 F.2d 293 (8th Cir. 1983). This contention is wholly without merit.

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[5]Petitioner's reliance on *Burch* is similarly misplaced because in that case there was no detailed description of the items to be seized.

The *Apker* decision relied upon by petitioner was reversed en banc by the Eighth Circuit. *United States* v. *Fitzgerald*, No. 82-1242 (Dec. 7, 1983), cert. denied, No. 83-600 (Jan. 23, 1984), petition for cert. pending, No. 83-1285. As the court of appeals explained in *Fitzgerald*, the seizure of incriminating items found in plain view by officers lawfully present is clearly authorized by the decisions of this Court (slip op. 4; see, *e.g.*, *Texas* v. *Brown*, No. 81-419 (Apr. 19, 1983)) and fully accords with the decisions of other courts of appeals relied upon by petitioner (see *Fitzgerald* slip op. 5-6 n.3). Here, the district court correctly explained that all the prerequisites for application of the plain view doctrine were satisfied: the officers were legitimately present in petitioner's law office by virtue of the search warrant; the "double checks" were discovered inadvertently in the course of organizing the lawfully seized checks; and the agents had probable cause to believe the checks were evidence of a crime. See Pet. App. 30a-34a.

3. Petitioner contends in conclusory fashion (Pet. 10) that he was denied due process because of the district court's failure to permit a new plea to allegedly amended charges.[6] This contention is insubstantial and was correctly rejected by the courts below (see Pet. App. 41a). Petitioner stipulated prior to trial that, if the items seized during the search

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[6]Following the district court's ruling admitting into evidence the items taken in the search, the government presented petitioner's 1975 tax return and an agreement between the parties signed by petitioner as well as by his attorney, wherein petitioner admitted he was guilty of the crime charged in the information. The government then rested its case. Petitioner thereupon moved for a judgment of acquittal on the ground that a stipulation of facts attached to the written agreement, which admitted a misstatement of gross income, failed to prove an understatement of taxable income, as charged in the information. The court at that point allowed the government to amend the information to address this technicality by adding a charge that business income as well as taxable income was understated.

were not suppressed, he was guilty of the charge set forth in the information and the evidence was sufficient to sustain a finding of guilt. See *id.* at 40a n.1. Under these circumstances, his argument in the trial court that the stipulation did not establish the crime charged in the information (because the stipulation referred to an misstatement of *gross* income while the information charged a misstatement of *taxable* income) was frivolous. Allowing the government to amend the information to address this technicality by charging a misstatement of business income as well did not prejudice petitioner in any way.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FELIX S. JACOB,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I.

THE SEARCH WARRANT INVOLVED WAS IMPROPERLY GENERAL IN VIOLATION OF THE FOURTH AMENDMENT.

The Government contends, "The search warrant clearly did not authorize a general search." (Opp. Br., p. 7) In *United States v. Burch*, 432 F. Supp. 961, aff'd 577 F.2d 729 (3rd Cir. 1978), a warrant was struck down for the

impermissibly general language: ". . . and other unknown articles." The Jacob warrant authorized search for "evidence of violation of federal criminal law, including, but not limited to, mail fraud in violation of 18 USC § 1341." The above quoted language specifies only one crime alleged to be involved, but authorizes search for violation of *any* federal crime. Thus the breadth of the search was left wholely to the discretion of the officers executing the warrant, an outcome which squarely conflicts with *Burch*. This was the opinion of Judge Miller, who originally suppressed all of the evidence.

II.

THE *JACOB* DECISION IN THE FOURTH CIRCUIT IS IN CONFLICT WITH THE RECENT DECISIONS IN THE FIRST, THIRD, FIFTH AND NINTH CIRCUITS (*Riggs, Christine, Cook,* and *Cardwell*).

The Government correctly states that *United States v. Apker* 705 F.2d 293 (8th Cir. 1983) was reversed by the Eighth Circuit Court of Appeals en banc. *United States v. Fitzgerald* No. 82-1242 (Dec. 7, 1983), cert. denied, No. 83-600 (Jan. 23, 1984), petition for cert. pending, No. 83-1285. However, the law of the several circuits remains unsettled as to the legality of admitting evidence found in plain view during the execution of a "severed" warrant, as evidenced by the First, Third, Fifth and Ninth Circuit opinions cited in *Apker*:

> "The approach of severing the general parts of a warrant, rather than considering the entire warrant invalid, has been embraced by four circuits, although in a more narrow version than that suggested by the dissent. *United States v. Riggs*, 690 F.2d 298 (1st Cir. 1982); *United States v. Christine*, 687 F.2d 749 (3rd Cir. 1982); *United States v. Cardwell*, 680 F.2d 75 (9th Cir. 1982); *United States v. Cook*, 657 F.2d 730 (5th Cir. 1982). Although these courts accepted the severance approach in principle, no court has permitted the admission of items found in plain view while

executing the specific parts of the warrant. We would have to adopt an expansive, plain view severance approach to allow the guns to be admitted in this case. In *Riggs* and *Cook*, the courts were addressing the admissibility of items which were specifically described in the warrant. In *Christine*, a concurring judge would have adopted the plain view severance approach, but the majority did not adopt that rule. In *Cardwell*, the severance approach was embraced only in dicta; the court did not discuss a plain view extension." 705 F.2d at 307.

Application of the plain view exception in severance cases serves to undermine the very rationale of the practice of severance. In the instant case, the warrant, as severed, allowed executing officers to search for and seize particular items that were or could have been evidence of mail fraud. Although no evidence of mail fraud was uncovered, evidence allegedly seized "in plain view" was admitted against Jacob in a subsequent federal criminal proceeding, the subject of this petition. The danger of admitting evidence seized in plain view in a case such as this one is highlighted by the fact that among those present to search Jacob's office, was a special agent of the Internal Revenue Service. It is not difficult to imagine that the special agent's role in executing the warrant was to search for evidence of violation of federal tax law, an area not specified by the language of the warrant, but the area of federal criminal law under which Jacob was later charged and convicted. It is beyond the realm of credibility to suggest that the agents were searching for evidence of mail fraud alone. By holding the evidence seized allegedly in plain view to be admissible under these circumstances, the courts below have, for all practical purposes, revived the general language of the original warrant.

Jacob has been in personal contact with the Attorneys for *Apker* and *Fitzgerald* and as of March, 1984, Certiorari

has been denied in *Apker* and is pending in *Fitzgerald*, with Attorney John R. Wylde of Minneapolis just receiving an extension in *Fitzgerald* to file Petitioner's Reply Brief, the Petition for a Writ of Certiorari (No. 83-1285), having been filed on February 3, 1984.

It should be noted in *Apker* and *Fitzgerald* that there were allegations of Defendants being members or associates of the Hells Angels of Omaha and that, as such, they were involved in a conspiracy to distribute Methamphetamine and to gain a monopoly on the Methamphetamine traffic in Omaha, using threats, beating, torture, and murder against their competitors. Defendants were subsequently convicted of firearm possession under a plain view theory.

In *Fitzgerald*, the Government in its Brief for the United States in Opposition states:

> "Here the Federal and State Officers were told prior to the searches that petitioners had felonly convictions and therefore could not lawfully possess firearms (Pet. App. A7). Moreover, there is no suggestion that the agents had probable cause to believe they would find drugs or firearms while executing the arrest warrants."(Opp. Br., p. 16).

This is strikingly different from the *Jacob* case where there were no allegations of any on-going criminal activity. Indeed there was nothing apparently incriminating about the checks seized from Jacob as the Government had to bring witnesses to a Grand Jury after the raid to work up a nebulous tax case against Jacob where there was no tax deficiency against Jacob for 1975 or any other tax year.

On April 26, 1979, Felix S. Jacob was a practicing attorney in Baltimore, Maryland, who had been a member of the Maryland Bar since his graduation from Harvard Law School in 1955, was licensed to practice before the

Court of Appeals of Maryland and the Supreme Court of the United States, and had a good rating from Martindale Hubble and had never had any charge more serious than a speeding ticket. He is still a practicing attorney in Maryland since the Maryland Court of Appeals, in a full hearing with all members present, refused to suspend Jacob pending this appeal. Jacob submitted affidavits from many of his clients attesting to his good name in the community and requesting the Maryland Court of Appeals to allow him to continue practicing pending the final outcome of this case. On the evening of April 26, 1979, his office was subject to a raid by seven Government Agents, with a gun, including a special agent of the Internal Revenue Service, for over seven hours, based on a warrant that mentioned dealings with Dr. Gluck and payoffs of three insurance adjusters for mail fraud in violation of 18 U.S.C. § 1341. The facts were that Jacob had only had minimum contacts with Dr. Gluck and terminated the relationship in early 1973, over 6 years before the raid, there being a five year statute of limitations for mail fraud. In fact, Jacob had never even seen Dr. Gluck and had instructed everyone in his law offices to break off any contacts with Dr. Gluck in early 1973.

There was a complete misunderstanding regarding the three insurance adjusters, and not one penny was ever paid off to them. Not one of them testified before the Grand Jury involving Jacob, and one of them from the Nationwide Insurance Company signed an Affidavit in the Federal file denying payoffs from Jacob. Please note the footnote in the *Jacob* case on the Government's Brief:

> "The names of the adjusters were ordered excised from the public record by the District Court (Pet. App. A N.1)." (Opp. Br., p. 3).

This was done on motion by the Government after the November, 1980, hearing before Judge Miller in the United States District Court for Maryland to protect the

names of the innocent adjusters. Obviously, the Government was conceding that there was no probable cause against Jacob in the first place. In addition, the Assistant U.S. Attorney signed an affidavit that he was contemplating re-employment with the same law firm that he was with after graduation from Law School in 1973, said firm representing Nationwide and Maryland Casualty, two of the three companies named in the warrant.

Therefore, it appears that recent decision of the Fourth Circuit in the *Jacob* case is still in direct contrast to the position taken by the First, Third, Fifth and Ninth Circuits as cited in the *Apker* case.

III.

THE RECENT *APKER* AND *FITZGERALD* DECISIONS IN THE EIGHTH CIRCUIT PROPERLY OPEN UP A GOOD FAITH TEST WHICH SHOULD BE APPLIED IN THE *JACOB* CASE.

The *Fitzgerald* case on page seven of the slip opinion stated:

> "Because the record reflects neither pretext, bad faith, nor lack of inadvertence on the officers' part, the District Court properly admitted the shotgun into evidence."

This makes good sense. Petitioner takes the position that this Honorable Court should take the *Jacob* case to help clarify a good faith exception in Fourth Amendment cases, thus avoiding a questionable and nebulous finding of plain view where none existed in the first place. In addition, Petitioner maintains that plain view was waived at the first suppression hearing in 1980 when Judge Miller conducted a full hearing on the warrant and the search and asked the Assistant U.S. Attorney whether he was claiming plain view and he said he was not. A lawyer has a right to bind his client and the waiver by the First Assistant U.S. Attorney should have been binding on his client, the U.S. Government. Petitioner also maintains

that it was improper for the Fourth Circuit to order a new hearing on the search, when Judge Miller has already had a full hearing on the Search in November of 1980 and witnesses had testified. The Government's agreement with Jacob was that the only evidence that could be presented against him would be from the search, and if the evidence from the warrant and search turned out to be invalid, then Jacob would be not guilty. Jacob preserves this claim of double jeopardy when he filed a Writ of Certiorari in 1981. Solicitor General Rex E. Lee in January of 1982 stated that whatever the merits of Petitioner's contentions they were not presently ripe for review by this Court and that if Petitioner was convicted, he would then be able to present these claims to this Court, together with any other claims he may have, in a Petitioner for Writ of Certiorari, seeking review of a final judgment against him. The United States Court of Appeals for the Fourth Circuit affirmed Jacob's conviction, becoming the only Circuit in the country to allow the plain view exception in a severance case, without going on the determined good faith. It is Petitioner's contention the issues are ripe for review.

It is Jacob's understanding that this Honorable Court has heard a good faith case in *Massachusetts v. Sheppard,* No. 82-963.

Jacob asks this court to accept the *Jacob* case, apply a good faith exception in severance cases and Jacob maintains there was no good faith for the following reasons:

> 1. The presence of a Special Agent of the IRS on the evening of the raid. See App. 11-131 of the Special Agent Handbook which states on 313(1):
>
> "The purpose of a special agent's investigation is to obtain facts and evidence. His/her primary aim is to determine whether the person under investi-

gation has committed a criminal violation." Supp. App. 1.

2. The sworn statement of no wrong-doing of Jacob by the adjuster from Nationwide Insurance Company.

3. The Government's Motion to protect names of innocent adjusters.

4. Assistant U.S. Attorney's affidavit of prospective re-employment with law firm representing two of the three insurance companies named in the warrant. It is an undisputed fact that there was no wrong-doing with any insurance company.

Apker and *Fitzgerald* have opened the door to a good faith exception and this should be followed in the *Jacob* case.

IV.

JACOB WAS DENIED FUNDAMENTAL DUE PROCESS UNDER THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES BY NOT BEING ASKED WHETHER HE WANTED A JURY TRIAL FOR THE AMENDED CHARGES IN VIOLATION OF THE GOVERNMENT'S WRITTEN AGREEMENT WITH JACOB.

The Government, states:

> "Petitioner contends in conclusory fashion (Pet. 10) that he was denied due process because of the District Court's failure to permit a new plea to *allegedly* (emphasis added) amended charge." (Opp. Br., p. 8)."

This is misleading as the Government's footnote on page eight clearly shows that the Court allowed the Government to make the amendments after the Government had presented its entire case and a motion was made by Petitioner for a judgment of acquittal. Either the acquittal should have been granted or Jacob should have been asked how he pleaded to the amended charge or whether he wanted to waive a jury trial to the amended charge.

CONCLUSION

The Government had no probable cause to start with, subjected Jacob's office to a Kremlin-type raid by seven agents armed with a gun looking for any "evidence in violation of Federal Criminal Law," used a special agent of the IRS, found nothing in plain view to start with, waived any plain view that might have been contended, improperly held a second trial after a full first trial had been heard and denied Jacob a right to a jury trial after denial of a motion of acquittal after the Government had rested its case.

The Government does not contend that Jacob owed one penny of tax for 1975 or any other year but has gone to the incredible expenditure of time and money to put Jacob through the ordeal of four federal trials. A conviction would likely lead to Jacob's suspension or disbarment from the practice of law. Jacob is innocent.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Supplemental Appendix

App II-131

SPECIAL AGENTS HANDBOOK

General Investigative Procedure

313 *(5-9-80)* **9781**

Planning (Generally)

(1) The purpose of a special agent's investigation is to obtain facts and evidence. His/her primary aim is to determine whether the person under investigation has committed a criminal violation, and, if the facts disclose violations subject to criminal or civil penalties within the jurisdiction of the Criminal Investigation Division, to obtain whatever evidence is required to sustain criminal proceedings or the assertion of civil penalties.

(2) The special agent should first determine what he/she is attempting to prove. This involves an evaluation and analysis of the allegation to ascertain whether the available facts indicate a violation within Criminal Investigation Division jurisdiction and what evidence must be obtained to establish the elements of the crime. A work chart or other plan of procedure may then be developed. This essentially involves a determination of listing of information and evidence required and the probable source thereof. Planning for fraud investigations is discussed in 3(10)8. See also IRM 9381 and 9382.

(3) All criminal investigations should be commenced and concluded as expeditiously as possible. They should be conducted impartially and thoroughly to obtain all pertinent information and evidence. Duplication in investigations, unnecessary inconveniences to the public and unnecessary embarrassment to the taxpayer should be avoided. Appropriate courtesy should be shown when soliciting information.